United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2144

ORIGINAL

To be argued by
MICHAEL B. MUSHLIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

RONALD BURGIN
a/k/a Hasan Jamal Abdul Majid, and
BILLY SANDIFER
a/k/a Mukhtar Abdul Wali,

Plaintiffs-Appellants,

-against-

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility and BENJAMIN WARD, Commissioner of New York State Department of Correctional Services,

Defendants-Appellees.

No. 75-2144

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P/S

BRIEF FOR PLAINTIFFS-APPELLANTS

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QUESTION PRESENTED

Whether the District Court erred in dismissing, sua sponte, appellants' complaint for failure to state a claim for relief where appellants clearly alleged that appellees were unreasonably restricting them in the free exercise of their religion at Auburn State Prison.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Northern District of New York (Port, J.), entered July 15, 1975, dismissing sua sponte appellants' pro se civil rights complaint (A. 14).*

*Numbers in parentheses preceded by "A" refer to pages of the appendix.

The verified complaint, submitted on March 7, 1975 alleged class action status and sought injunctive and declaratory relief and damages for defendants' alleged interference with plaintiffs' constitutional rights to the free exercise of the Sunni Muslim religion at Auburn State Prison.

Plaintiffs Majid and Wali alleged that they were representatives of a class of inmates who practice the Orthodox Sunni Muslim religion at that prison (A. 4). They claimed that, despite their several protests and administrative appeals, defendants were prohibiting them from practicing three essential aspects of their faith. Specifically, plaintiffs alleged interference with the following practices:

A. Prayer

Plaintiffs stated that "Sunni Muslims are enjoined by the Law of Islam to perform their prayers five (5) times a day...at fixed hours....Islam prayers are [performed] by [s]tanding, [b]owing and [p]rostrating, without any one of these forms the prayers (Salat) would be incomplete..." (A. 6). Plaintiffs stressed that these "religious obligations" posed no threat to the security of the institution (A. 6). However, defendants refused to allow plaintiffs to perform their prayer obligations in the proper manner (A. 6).

B. Head Coverings

Plaintiffs alleged that their religion requires that they keep their heads covered with prayer hats. These hats "not only serve as...a garment for prayer" but also are "an intricate part" of the Muslim Faith (A. 6). Although other inmates are allowed to wear head coverings in the prison, plaintiffs alleged that defendants on a number of occasions established policies "...[to] prohibit Sunni Muslims from wearing prayer hats..." (A. 6). Indeed, plaintiffs alleged that defendants had taken disciplinary action against them for seeking to practice their religion in this manner (A. 6).

C. Personal Appearance

Plaintiffs alleged that Sunni Muslims were required as a "religious obligation" to grow beards (A. 5). Plaintiffs emphasized this requirement is not "a style" or "fad", but rather is an "important part" of their sincere adherence to religious command, which poses no threat to any legitimate concern of the prison (A. 5). Furthermore, since plaintiffs are required by religious law to cleanse themselves five times daily, no sanitation problem is caused by their wearing facial hair (A. 5).

Plaintiffs alleged that they had made administrative appeals to secure defendants' permission to observe this religious practice. But on February 19, 1975, in a communication from the Deputy Superintendent of Auburn, and later on February 26, 1975, in a letter from the Assistant Director of the New York State Department of Correctional Services, the request was denied (A. 4-5). Although plaintiffs were told generally that this religious practice conflicted with departmental policy, defendants made no reference to any specific policy statement or to the rationale for any such policy (A. 5).

In their complaint plaintiffs made it clear that the religious practices they sought to observe were not unique to Auburn Prison but were part and parcel of the "same Islamic Religious Laws...maintained by...nine hundred and fifty million Sunni Muslims all over the world...with no compromise or innovation" (A. 7).

On July 11, 1975, without requiring any response from defendants, Judge Port sua sponte dismissed plaintiffs' complaint (A. 11-13). The court held that plaintiffs had not stated a federal claim regarding beards since prison regulations concerning personal appearance are constitutional (A. 12). The court dismissed plaintiffs' complaint

concerning the prohibition of prayer hats and interference with worship for the reason that "the Department of Correction has established thorough and comprehensive rules and regulations to ensure that members of the Muslim Faith have the same religious rights and privileges as extended to other denominations" citing 7 N.Y.C.R.R. Chapter II §§59.10 - 59-23, (Secs. filed June 28, 1972; repealed, filed Dec. 17, 1974, eff. December 30, 1974) (A. 12). The court stated that these "rules and regulations are reasonable and allow such freedom of religious observation and participation as is consistent with a maximum security penal institution" (A. 12).

On November 14, 1975, this Court granted appellants' motion for leave to appeal in forma pauperis and for assignment of counsel. On December 4, 1975, Joel Berger, Esq., The Legal Aid Society Prisoners' Rights Project, was appointed counsel.

Appellants here contend that the district court erred in dismissing their pro se complaint and that the case should be remanded to that court for an evidentiary hearing on each of their claims.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' COMPLAINT, WHICH STATED CLAIMS FOR RELIEF FOR VIOLATIONS OF APPELLANTS' RIGHT TO FREEDOM OF RELIGION.

In our society, absent the most exigent of circumstances, a person is free to practice his religion without interference or regulation by the Government. Sherbert v. Verner, 374 U.S. 398 (1963).

To properly accord the highest protection to this "preferred" and "fundamental right," courts have been especially solicitious in resolving claims of abridgment of religious freedom. Pierce v. LaVallee, 293 F.2d 233, 235 (2nd Cir. 1961). It has been held that only those governmental interests "of the highest order...not otherwise served" are sufficient to "overbalance legitimate claims to the free exercise of religion". Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (Berger, C.J.). See also Thomas v. Collins, 323 U.S. 516, 530 (1945) ("only the gravest abuses, endangering paramount interests, give occasion for permissible limitation" on first amendment rights). And even where the state interest is compelling, religious freedoms nevertheless may not be infringed if the governmental interest can be served by a less drastic alternative. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

While incarceration in prison obviously results in the retraction of many privileges, Price v. Johnston 334 U.S. 266, 285 (1948), it is now firmly established that "there is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974). Thus, the precepts governing first amendment religious freedoms do not "stop short ...at the prison's door." Sharp v. Sigler, 408 F.2d 966, 970 (8th Cir. 1969), (Blackmun, J.); Cooper v. Pate, 378 U.S. 546 (1964); Cruz v. Beto, 405 U.S. 319 (1972); Procunier v. Martinez, 416 U.S. 396 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

Four years ago, this Court held that limitations upon freedom of religion in prison can be imposed only "if the state regulation has an important objective and the restraint of religious liberty is reasonably adopted to achieving that objective." LaReau v. McDougall, 473 F.2d 974, 979 (2nd Cir. 1972).

Only recently this Court once again restated this strict test by ruling that prison regulations which 'bperate on fundamental rights such as the freedom of worship" must give way unless "justified by an important and substantial governmental interest in the

restriction by the penal institution." Kahane v. Carlson, ___F.2d___ Docket No. 75-2088, slip op. 715, 720 (2nd Cir., November 26, 1975).*

According plaintiffs' complaint the solicitude due pro se pleadings, Haines v. Kerner, 404 U.S. 519 (1972), and applying the required standard of accepting all allegations of the dismissed complaint as true, Conley v. Gibson, 355 U.S. 41, 45-46 (1957), the district court committed error in dismissing plaintiffs' complaint sua sponte without requiring the state to justify the restrictions placed upon plaintiffs' freedom to practice their faith.

Plaintiffs clearly alleged deprivations of religious freedom in their complaint. They are members of the orthodox Sunni branch of the Islamic Faith, a religion which numbers over nine hundred and fifty million adherents around the world (A. 7), and which along with Christianity and Judiasm is one of the "three major western faiths."

*In Kahane this Court left open whether the stricter compelling state interest test applies to prison first amendment claims since it found that the rationale for the prison regulation of kosher food for Jewish inmates in that case failed to rise to the level of an important or substantial governmental interest. Kahane v. Carlson, supra, slip op. at 720, fn. 6.

At least two other circuits have adopted the compelling state interest test in resolving prisoner first amendment religious claims. Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971); United States ex rel. Jones v. Rundle, 453 F.2d 147, 150 (3rd Cir. 1971); See also Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa, 1973) aff'd, 494 F.2d 1277 (8th Cir. 1974).

Wilson v. Beame, 380 F. Supp. 1232, 1239 (E.D.N.Y. 1974). Thus, it cannot be seriously contended that plaintiffs lay claim to first amendment protection for practices of a manufactured faith,* or even one which because of its tenets may pose a threat to prison security. Sostre v. McGinnis, 334 F.2d 906, 909 (2nd Cir. 1964) cert. denied, 379 U.S. 892 (1964) (the difference between Black Muslims and Orthodox Muslims is "far more striking than the similarities"). Moreover, plaintiffs clearly allege that their religion dictated performance of all three practices which the Auburn penal authorities prohibited.

The necessity to pray according to the dictates of one's religion is the most obvious religious obligation. In the Islamic faith, as plaintiffs allege, "there are five prayer rites daily." Wilson v. Beame, supra, 380 F. Supp. at 1241.

*Compare Theriault v. Carlson, 495 F.2d 390 (5th Cir. 1974) on remand, sub nom, Theriault v. Silber, 391 F. Supp. 578 (W.D. Texas, 1975), with Remmers v. Brewer, supra, 361 F. Supp. 537 (S.D. Iowa, 1973) aff'd, 494 F.2d 1277 (8th Cir. 1974).

Religious worship such as plaintiffs' Islamic prayers have long been recognized by the courts as the "hallmark of organized religion". Wilson v. Beame supra, 380 F. Supp. at 1239. Courts, therefore, have taken great care to preserve an individual's right to participate in this most fundamental religious activity. United States ex rel. Jones v. Rundle, supra, 453 F.2d 147 (3rd Cir. 1971); Brown v. Peyton, supra, 437 F.2d 1228 (4th Cir. 1971); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), aff'd, 435 F.2d 1255 (3rd Cir. 1970), cert. denied, 403 U.S. 936 (1971); Fulwood v. Clemmer, 206 F. Supp. 370 (D. D.C. 1962).* See also Bethea v. Daggett, 329 F. Supp. 796 (N.D. Ga. 1970), aff'd, 444 F.2d 112 (5th Cir. 1971) (although holding that Muslims were entitled to pray five times daily, denying relief because prison authorities actually provided such opportunities).

Plaintiffs' inability to wear head coverings stands on a similar footing. In a strikingly similar case to the instant one, Abdullah v. Manson, Civil No. 15,606

*Indeed, several of the above cited cases held that reasonable opportunities for congregate forms of prayer are required. The court below did not pass upon this question, although a brief reference was made to it in plaintiffs' complaint (A. 6).

(D. Conn. March 13, 1973), the court held an evidentiary hearing on plaintiff's claim that a prison rule restricting head coverings violated his first amendment Rights as a Sunni Muslim. Following trial at which the state argued that security considerations necessitated the rule, the court held that the evidence before it was not compelling enough to override plaintiff's first amendment rights. Accordingly, the regulation was struck down. Abdullah v. Manson, supra, slip op. at 5.

The court in the instant case dismissed plaintiffs' religious claims concerning prayer and head coverings on the sole ground that the state penal authorities had established a set of rules and regulations governing the practice of the Muslim Faith. The court held that these "thorough and comprehensive" regulations were "reasonable" and "allow such freedom of religious observation and participation as is consistent with a maximum security penal institution" (A. 12).

First amendment freedoms stand on too high a ground to be so briskly dismissed by mere citation to a set of regulations. The law clearly requires the district court to subject the regulations to rigorous and close scrutiny in order to determine whether an important or substantial governmental interest requires abridgment of plaintiffs'

right to practice their religion. Kahane v. Carlson, supra, slip op. at 720.

Where prison rules and regulations restricting religious freedoms of inmates are involved, the court may not simply dismiss the complaint without a hearing, but must subject the rules to strict scrutiny to decide whether the rules are "reasonable and justifiable" Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966), and whether the purposes sought to be advanced by the regulations cannot be pursued by means that less broadly stifle fundamental personal liberties, Ross v. Blackledge 477 F.2d 616, 618 (4th Cir. 1973). For the mere existence of prison regulations governing religious observances does not eliminate the need for reasons "imperatively justifying the particular retraction of rights, [n]or does it lessen governmental responsibility to reduce the resulting impact upon those rights to the fullest extent consistent with the justified objective." Barnett v. Rodgers, 410 F.2d 995, 1001 (D.C. Cir. 1969).

Thus, district court orders dismissing prisoner religious claims have been regularly reversed where, as here, the court failed to hold a hearing to determine whether prison regulations unnecessarily infringed upon

religious liberties. Cruz v. Beto, supra, 405 U.S. 319 (1972); Ross v. Blackledge, supra, 477 F.2d 616 (4th Cir. 1972); United States ex rel. Jones v. Rundle, supra, 453 F.2d 147 (3rd Cir. 1971); Brown v. Peyton, supra, 437 F.2d 1228, 1231 (4th Cir. 1971); Long v. Parker, 390 F.2d 816 (3rd Cir. 1968); Walker v. Blackwell, supra, 360 F.2d 66 (5th Cir. 1966). See also Morgan v. LaVallee, ____F.2d____, Docket No. 75-2044, slip op. 191, 196 (2nd Cir., October 14, 1975) (reversing district court dismissal, sua sponte, of prisoner first amendment right of access to media claim where lower court failed to "close[ly] examine" whether prison regulation as applied was unconstitutional).

The failure to closely scrutinize plaintiffs' claims in the instant case is revealed by the fact that the very regulations upon which the court relied were repealed six months prior to the court's ruling. 7 N.Y.C.R.R. Chapter II §§59.10 - 59.23 (filed June 28, 1972; repeal filed, December 17, 1974, eff. December 30, 1974). Obviously, these regulations can provide no basis -- much less an important or substantial one -- upon which plaintiffs' complaint can be dismissed.

The district court dismissed plaintiffs' final claim, regarding interference with the Islamic Faith's requirement that adherents grow facial hair, without the slightest showing of justification by the state. That claim was rejected solely on the ground that "prison regulations regarding beards including the prohibition of the same are constitutional" (A. 12).

The opinion of the district court, which relied on cases in other circuits*, disregarded a decision of this Court directly on point. In Sostre v. Preiser, 519 F.2d 763 (2nd Cir. 1975) this Court reversed an order of the same district court denying a preliminary injunction against a "no beard" rule at Auburn and Clinton prisons. In that case, even though no religious significance was attached by appellant to his beard, this Court held that the regulation on personal appearance must fall unless factually "supported by the legitimate and reasonable needs and exigencies of the institutional environment." Sostre v. Preiser, supra, 519 F.2d at 764, quoting Wolff v. McDonnell, supra, 418 U.S. at 539; see also Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971)

*Blake v. Pryse, 444 F.2d 218 (8th Cir. 1971); Rhinehart v. Brewer, 491 F.2d 705 (8th Cir. 1974); Williams v. Batton, 342 F. Supp. 1110 (E.D.N.C. 1972) and Collins v. Haga, 373 F. Supp. 923 (W.D. Vir. 1974).

(striking down unreasonable prison hair regulation); cf. Dwen v. Barry, 483 F.2d 1126 (2nd Cir. 1973), cert. granted, 43 U.S.L.W. 3621 (U.S. May 27, 1975), argued, 44 U.S.L.W. 3357 (December 8, 1975).

Where, as here, their is "a link between hair style and the plaintiff's religion" Teterud v. Gillman, 385 F. Supp. 153, 156 (S.D. Iowa, 1974) fundamental and preferred first amendment rights come into play. In Teterud after a full evidentiary hearing at which prison officials' reasons for hair length restrictions were explored in depth, the court held that the regulation could not withstand a first amendment attack by an American Indian whose religion required he wear long hair. The court concluded that the hair regulation is "unnecessarily broad in its sweep" and could not justify infringement of "plaintiff's constitutional right to the free exercise of his religion." Teterud v. Gillman, supra, 385 F. Supp. at 159-160.

In sum, the district court failed to recognize the constitutional significance of each of plaintiffs' claims. This Court should rectify that error by reversing the decision and remanding this case to the district court for further proceedings. This would preserve the special importance which attaches to an individual's right in prison to

practice his faith. For as the court noted in Barnett v. Rodgers, supra, 410 F.2d 995, 1002 (D.C. Cir. 1969):

> Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF DISMISSAL SHOULD BE REVERSED.

Respectfully submitted,

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